

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES ex rel. PATRICIA
LINCOLN,

Relator,

V.

MED-DATA, INC.; and JOHN DOES 1-10

Defendants.

CASE NO. C03-3834P

ORDER ON DEFENDANT'S
MOTION TO DISMISS AND
MOTION TO BIFURCATE

Defendant moves to dismiss Plaintiff's complaint. Having reviewed Defendant's Motion to Dismiss, Relator's Response Motion, and all other pertinent papers, the Court rules the following: Defendant's Motion to Dismiss Relator's False Claims Act causes of action under 31 U.S.C. § 3729(a)(1) and 31 U.S.C. § 3729(a)(2) is DENIED. Defendant's Motion to Dismiss Plaintiff's False Claims Act conspiracy cause of action under 31 U.S.C. § 3729(a)(3) is GRANTED. Defendant's Motion to Dismiss Plaintiff's Retaliation claim under 31 U.S.C. § 3730(h) and state law claim under Cal. Ins. Code § 1871 is DENIED. Defendant's Motion to Dismiss Plaintiff's state law cause of action for wrongful termination in violation of public policy is GRANTED. Defendant's Motion to Bifurcate is DENIED. Following Fed. R. Civ. P. 15(a) the Court GRANTS Plaintiff's request for leave to file the Proposed Second Amended Complaint. Because Defendant

ORDER - 1

1 fails to substantively address why the Court should dismiss the “John Doe” Defendants,
 2 the Court declines to dismiss them at this time.

3 **BACKGROUND**

4 Patricia Lincoln was a claims auditor employed by Defendant Med-Data. She
 5 alleges that Med-Data coders inflated emergency room MediCare bills submitted to the
 6 Federal Government and to private insurers as part of a wider corporate policy designed
 7 to increase company revenue. Plaintiff alleges that when she brought her concerns
 8 regarding specific claims to the attention of her superiors, her concerns were ignored.
 9 When she continued to raise them, she alleges that she was demoted and then fired. She
 10 brought a *qui tam* action against Med-Data under the False Claims Act, 31 U.S.C. § 3729
 11 et seq. The government declined to intervene and she has opted to pursue the case on her
 12 own as a Relator. In response to the pending Motion to Dismiss, Plaintiff filed a Proposed
 13 Second Amended Complaint (Dkt. No. 43, at 18-34) without leave of the Court. The
 14 Court has decided this matter relying on Plaintiff’s Second Amended Complaint and the
 15 attached exhibits.

16 **ANALYSIS**

17 Plaintiff has brought multiple causes of action, each stemming from alleged fraud
 18 perpetrated by Med-Data, Plaintiff’s investigation into the fraud, and Defendant’s alleged
 19 retaliation against Plaintiff as a result. The fraud, conspiracy, and retaliation claims,
 20 under both federal and state law, will be addressed below. Defendant’s Motion to
 21 Bifurcate will be analyzed last.

22 **1. False Claims to the Government**

23 The Relator brings suit under 31 U.S.C. § 3729(a)(1) and 31 U.S.C. § 3729(a)(2)
 24 of the False Claims Act. Defendant moves to dismiss the claims for failure to plead with
 25 particularity. Under Fed. R. Civ. P. 8(a) a plaintiff need only make “a short and plain

1 statement of the claim" in her pleading. Fed. R. Civ. P. 9(b) is an exception to Fed. R.
 2 Civ. P. 8(a) and requires that in "all averments of fraud or mistake, the circumstances
 3 constituting fraud or mistake shall be stated with particularity." Allegations of fraud made
 4 under the False Claims Act must meet the heightened pleading standards of Fed. R. Civ.
 5 P. 9(b). Bly-Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001).

6 To meet the pleading with particularity requirement of Fed. R. Civ. P. 9(b),
 7 Plaintiff must provide the who, what, when, where, and how of the fraud claim. Vess v.
 8 Ciba-Geigy Corp., USA, 317 F.3d 1097, 1106 (9th Cir. 2003). The particularity must be
 9 sufficient to enable Defendant to effectively answer the allegations. Wool v. Tandem
 10 Computers Inc., 818 F.2d 1433, 1439 (9th Cir. 1987). Mere neutral identifiers, while
 11 necessary, do not in themselves exhaust the particularity requirement: The circumstances
 12 indicating the basis of the allegation of falsity must also be set forth. Decker v. Glenfed,
 13 Inc., 42 F.3d 1541, 1548 (9th Cir. 1994).

14 A motion to dismiss for failure to plead with particularity is the functional
 15 equivalent of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Vess, 317 F.3d at 1107.
 16 In arguing for a dismissal of Plaintiff's claim, Defendant conflates the elements Plaintiff
 17 would have to prove at trial under the False Claims Act with the scope of the particularity
 18 required by Fed. R. Civ. P. 9(b). A fraudulent claim under 31 U.S.C. § 3729 requires 1)
 19 knowingly presenting 2) to the United States or an officer of the United States 3) a false
 20 or fraudulent claim for payment, where "knowingly" is defined as at least reckless
 21 disregard for the truth and a "claim" is defined as a request or demand for money that the
 22 government has paid or will pay. Not all of these elements need to be pled with
 23 particularity. "Malice, intent, knowledge, and other condition of mind of a person may be
 24 averred generally." Fed. R. Civ. P. 9(b). Rule 9(b) does not require any particularity in
 25 connection with an averment of intent, knowledge, or condition of the mind. Decker, 42

1 F.3d at 1545. The particularity requirement is limited to the allegations of fraud and
2 misconduct and to the circumstances surrounding the alleged fraud.

3 In determining the scope of particularity required, the Court may properly grant
4 some leniency to a relator where the Defendant is a corporation with exclusive control of
5 relevant documentation and the relator is a former employee with limited ability to
6 acquire relevant documentation. Lee, 245 F.3d at 1052. Lincoln allegedly began
7 investigating Med-Data while still an employee but did not initiate suit until after her
8 relationship with Med-Data was severed. Following her departure, Lincoln had limited
9 ability to acquire additional documentation.

10 Defendant argues Plaintiff has, among other deficiencies, not adequately
11 demonstrated that the allegedly fraudulent claims were ever submitted to and paid by the
12 Government. Ultimate liability under the FCA attaches not to the underlying fraudulent
13 scheme but to the submission of the false claim itself. Hopper v. Anton, 91 F.3d 1261,
14 1266 (9th Cir. 1996). Defendant quotes Karvelas v. Melrose-Wakefield Hospital, 360
15 F.3d 220, 233 (1st Cir. 2004), in claiming that “the complaint should include ‘details
16 concerning the dates of the claims, the content of the forms or bills submitted, their
17 identification numbers, the amount of money charged to the government, the particular
18 goods or services for which the government was billed, and the individuals involved in
19 the billing.’” (Dkt. No. 47 at 3). But in the same passage Karvelas explicitly states that
20 the above list is meant only to demonstrate the “types of information that may help a
21 relator to state a claim with particularity” and that “these details do not constitute a
22 checklist of mandatory requirements that must be satisfied by each allegation included in
23 a complaint.” Id. Under Fed. R. Civ. P. 9(b) a complaint must be specific enough to give
24 the Defendant notice of the alleged misconduct and to enable it do more than merely deny
25 wrongdoing. Lee v. Smithkline Beecham, Inc., 245 F.3d 1048, 1052 (9th Cir. 2001).

1 In her Second Amended Complaint and attached Exhibits, Plaintiff successfully
2 pleads her allegation of fraudulent claim submissions at Med-Data under Fed. R. Civ. P.
3 9(b). Exhibit A provides the particulars for allegedly fraudulent claims submitted to the
4 government, including the name of the patient, the name of the physician, the date the
5 services were coded by Med-Data, the name of the coder, the name of the auditor, the
6 code Med-Data submitted, the allegedly proper code, and Plaintiff's basis for alleging
7 that the original, submitted code was fraudulent. Under Fed. R. Civ. P. 9(b), this
8 information is adequate for Med-Data to be able to both identify the transaction in
9 question and to challenge the basis for Plaintiff's allegation that the claims were
10 fraudulently submitted. Defendant notes that there may be explanations other than fraud
11 for the apparent coding discrepancies. While this may be true, Plaintiff is required at this
12 time to do no more than she has done in order to meet the pleading requirements of Fed.
13 R. Civ. P. 9(b) and the Court is required to dismiss a claim only if it is clear that no relief
14 could be granted under any set of facts consistent with Plaintiff's allegations.

15 Swiekiewicz v. Sorema N.A., 534 US 506, 514 (2002).

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17 **2. Conspiracy claim**

18 The False Claims Act, in 31 U.S.C. § 3729(a)(3), attaches liability to “[a]ny
19 person who conspires to defraud the Government by getting a false claim allowed or
20 paid.” Conspiracy claims made under the False Claims Act must meet the particularity
21 pleading requirement of Fed. R. Civ. P 9(b). Vess, 317 F.3d at 1108. In supporting her
22 allegations of conspiracy to commit fraud, Plaintiff relies entirely on vague allegations
23 and unattributed comments. Plaintiff alleges that MDI set in motion a “chain of events
24 and a business environment which was calculated to result in the submission of false
25 claims,” and avers that “top management went to great pains to ensure that the impact of
26 these schemes was never uncovered.” (Dkt. No. 43 at 23 and 25). However, Plaintiff
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1 provides scant addition information related to these sweeping allegations, adding only
2 that MDI “ordered” coders, “pressured” coders, and “instructed” coders in practices
3 relating to inflated billings. (*Id.*, at 23-26). Plaintiff provides no evidence of an
4 agreement or so much as names a second defendant with whom an agreement to defraud
5 the government might have been struck. Such conclusory allegations do not adequately
6 allow Defendant to prepare a defense to conspiracy charges, do not set forth the
7 circumstances constituting fraud, and do not meet the particularity requirement of Fed. R.
8 Civ. P. 9(b). Decker, 42 F.3d at 1548.

9
10 Because the Court finds that the pleading requirements under Fed. R. Civ. P. 9(b)
11 have not been met by Plaintiff’s First or Second Amended Complaint as to the conspiracy
12 charges, it does not reach the legal question of intra-corporate immunity to conspiracy
13 under the False Claims Act, as raised by the parties in their motions.
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15 Plaintiff’s conspiracy claim under 31 U.S.C. § 3729(a)(3) is DISMISSED.
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17 **3. Retaliation**

18 The False Claims Act, in 31 U.S.C. § 3730(h), allows a plaintiff to seek relief in
19 Federal District Court for retaliation exacted by her employer as a result of activity
20 related to a False Claims Act claim. “A retaliation claim under 31 U.S.C. § 3730(h) does
21 not require a showing of fraud and therefore need not meet the heightened pleading
22 requirements of Rule 9(b).” Karvelas v. Melrose-Wakefield Hospital, 360 F.3rd 220, 238
23 (1st Cir. 2004). Fed. R. Civ. P. 8(a) requires merely “a short and plain statement of the
24 claim.” A plaintiff need only give fair notice of the claim and its basis in her pleadings.
25 Sagana v. Tenorio, 384 F.3d 731 (9th Cir. 2004). Dismissal of a claim is appropriate only
26 if it is clear that no relief could be granted to the Plaintiff under any set of facts consistent
27 with the allegations. Swiekiewicz, 534 US at 514.
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1 To sustain a retaliation claim under the False Claims Act, a relator must be able to
2 show that 1) she was engaging in conduct protected under the FCA; 2) her employer
3 knew she was engaging in such conduct; and 3) she was discriminated against because of
4 such conduct. Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996). Neither the plaintiff
5 nor the employer need to have anticipated a False Claims Act claim either at the time of
6 relator's investigation or the time of the alleged retaliation. Id. However, the employee's
7 actions must have included investigations which reasonably could have led to a viable
8 FCA action. Id.

9 Relator alleges that she was investigating the coding practices of Med-Data, that
10 she notified Med-Data of irregularities she uncovered, that Med-Data continued its
11 previous practices, that she then reiterated her concerns and told Med-Data it was
12 "bilking" the federal government, that she continued her investigation, and that Med-Data
13 then both continued to submit fraudulent claims and fired Plaintiff as a result of her
14 investigations and allegations. Because these elements meet the liberal pleading
15 requirement of Fed. R. Civ. P. 8(a), Defendant's motion to dismiss Plaintiff's retaliation
16 claim is DENIED.

17 **3. State law fraud claim**

18 Plaintiff pursues a claim under Cal. Ins. Code § 1871.7, which provides that an
19 interested party may seek damages for allegedly fraudulent claims submitted to private
20 insurers. Fed. R. Civ. P. 9(b) is a federally imposed rule applied in federal courts to state-
21 law causes of action alleging fraud. Vess, 317 F.3d at 1103. Exhibits A and B of
22 Plaintiff's Second Amended Complaint include identical categories of information and
23 degrees of particularity: both include the patient's name, the doctor's name, the date MDI
24 coded the treatment received, the coder's name, the auditor's name, the code submitted to
25 insurers, the auditor's code, the party paying the bill, and Plaintiff's basis for alleging the
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1 submitted code was fraudulent. Exhibit A contains claims submitted to the Government.
2 Exhibit B contains claims submitted to private parties. Following the analysis of Fed. R.
3 Civ. P. 9(b) established in Section One, the Court DENIES Defendant's Motion to
4 Dismiss Relator's Cal. Ins. Code § 1871.7 cause of action.
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6 **4. Wrongful Termination**

7 Plaintiff alleges wrongful termination in violation of public policy, here directing
8 the Court to 31 U.S.C. § 3729 and to Cal. Govt. Code § 12653. In alleging wrongful
9 termination in violation of public policy, Plaintiff successfully states a claim on which
10 relief may be granted. Although Plaintiff's wrongful termination claim appears to overlap
11 significantly with her retaliation claim, she is permitted to bring claims under alternative
12 legal theories. Defendant's Motion to Dismiss Plaintiff's claim for wrongful termination
13 in violation of public policy is DENIED.
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15 **5. Motion to Bifurcate**

16 Defendant moves to bifurcate the claims at issue for trial, separating the wrongful
17 termination claims from the fraudulent practices claims. Fed. R. Civ. P. 42(b) provides
18 that a Court may separate claims in order to further convenience, increase efficiency or
19 avoid prejudice. A district court has wide discretion in ruling on a motion for bifurcation.
20 United States v. Matus-Leva, 311 F.3d 1214, 1217 (9th Cir. 2002). Defendant argues that
21 bifurcation in this case is appropriate because it would achieve each of the ends cited in
22 Fed. R. Civ. P 42(b) - efficiency, convenience, and the avoidance of prejudice. In
23 Defendant's Motion to bifurcate and Reply Motion in Support of Bifurcation, it is most
24 concerned about separating out Plaintiff's state law claim for wrongful termination in
25 violation of public policy. Because the wrongful termination claim involves the same
26 facts as the retaliation claim, the Court finds that the goals of Fed. R. Civ. P. 42(b) would
27 not be met by bifurcating the claims. The remaining claims also overlap. The retaliation
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1 cause of action under the False Claims Act necessarily incorporates some of the same
2 information as the fraudulent claims causes of action. Each relates to the business
3 environment and practices of Med-Data, the investigations conducted by Plaintiff, and the
4 exchanges between Plaintiff and Defendant prior to the discontinuation of their
5 relationship. Convenience and efficiency would not be achieved by repeating this
6 information in multiple trials. Defendant finally argues that a jury will be confused and
7 prejudiced by hearing testimony related to each of these claims. The Court finds
8 Defendant's conclusions unsupported and unpersuasive. Defendant's Motion to Bifurcate
9 is DENIED.

11 CONCLUSION

12 The Court DENIES Defendant's Motion to Dismiss Plaintiff's False Claims Acts
13 causes of action under 31 U.S.C. § 3729(a)(1), 31 U.S.C. § 3729(a)(2), and 31 U.S.C. §
14 3730(h). The Court also DENIES Defendant's Motion to Dismiss Plaintiff's state law
15 cause of action under Cal. Ins. Code § 1871.7. The Court GRANTS Defendant's Motion
16 to Dismiss Plaintiff's conspiracy claim under the False Claims Act, 31 U.S.C. 3729(a)(3)
17 and state law claim for Wrongful Termination in Violation of Public Policy. The Court
18 DENIES Defendant's Motion to Bifurcate. The Court GRANTS Relator leave to file a
19 Second Amended Complaint.

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22 Dated this 8th day of September, 2006.
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Marsha J. Pechman
United States District Judge